***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

# 76-7457

*To be argued by*
DANIEL M. COHEN
(20 MINUTES)

B

IN THE

# United States Court of Appeals

**For the Second Circuit**

CARL E. PERSON,

*Plaintiff-Appellee,*

*against*

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

*Defendants-Appellants.*

**On Appeal from the United States District Court for the Eastern District of New York**

## BRIEF OF DEFENDANTS-APPELLANTS


LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Defendants-Appellants*
Two World Trade Center
New York, New York 10047
(212) 488-3446

SAMUEL A. HIRSHOWITZ
*First Assistant Attorney General*

DANIEL M. COHEN
*Assistant Attorney General*
*Of Counsel*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Statutes and Rules:***

***Other Authorities:***

IN THE

# United States Court of Appeals

**For the Second Circuit**

**No. 76-7457**

CARL E. PERSON,

*Plaintiff-Appellee,*

*against*

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

*Defendants-Appellants.*

**On Appeal from the United States District Court for the Eastern District of New York**

## BRIEF OF DEFENDANTS-APPELLANTS

### Preliminary Statement

This is an appeal by defendants, Supreme Court of the State of New York, Appellate Division, First Department, Supreme Court of the State of New York, Appellate Division, Second Department, and the Attorney General of New York State, from a judgment filed August 12, 1976, by the Honorable John F. Dooling, Jr., United States District Judge for the Eastern District of New York, declaring Disciplinary Rule 7-109C of The Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association ("DR 7-109C"), and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division,

First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, unconstitutional, in so far as the Rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case.

It should be noted, at the outset, that neither the American Bar Association, which promulgated the Code, nor the State Bar Association, which adopted it to govern attorneys' conduct in New York, was made a party to this litigation. Their Rule has been declared unconstitutional in their absence. The American Bar Association adopted the Code of Professional Responsibility on August 12, 1969, effective January 1, 1970. Martindale-Hubbell Law Directory, Vol. VI, Preface, p. ii to Part VIII, 1C. The New York State Bar Association adopted the Code, effective January 1, 1970. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Appendix, pocket part, p. 100. The defendant, City Bar Association, is, at most, an investigative and prosecutorial agency of the First Department (First Department Rules, §603.4). As such, it has not taken a separate appeal. The Attorney General's defense (JA37)* that the Appellate Division defendants are not "persons" within the meaning of the Civil Rights Act was not passed upon by the District Court. The validity of this defense remains to be passed upon by the United States Supreme Court. *Law Students* v. *Wadmond*, 401 U.S. 154, 158, fn. 8 (1971).

---

* "JA" references are to the Joint Appendix.

## Statement of the Issues

1. Was the District Court without subject matter jurisdiction because of the lack of a case or controversy?

2. Was the District Court's action in declaring unconstitutional the prohibition in Disciplinary Rule 7-109C against payment of fees to expert witnesses contingent on the outcome of the case without legal foundation and/or factual support in the record?

3. Did the District Court abuse its discretion in acting in a summary manner?

## Statement of the Case

### (1)

In his Amended Complaint (JA3-26) plaintiff, an attorney appearing *pro se*, sought to strike down, as unconstitutional and in violation of the antitrust laws, those provisions of the Judiciary Law of New York, Rules of the four Appellate Divisions of the New York Supreme Court and Disciplinary Rules of The Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association, which prohibited or may have prohibited plaintiff and his clients from selling antitrust claims to the public as a means of financing antitrust lawsuits based upon those claims, and from paying expert witnesses on a contingent fee basis. More particularly, plaintiff claimed, *inter alia*, that the prohibitions against champerty, maintenance, barratry, splitting fees with a layman, unauthorized practice of law, and paying contingent fees to expert wit-

nesses violated his First and Fourteenth Amendment rights, posed a threat to the republican form of government, and were a burden on interstate commerce.

Plaintiff moved for the convening of a three-judge court claiming that his complaint presented substantial constitutional issues. Defendants opposed the motion on the grounds that substantial constitutional issues were not presented and that plaintiff was merely seeking an advisory opinion and should properly have presented the matter to the Ethics Committee of the Association of the Bar of the City of New York. By Memorandum and Order dated March 24, 1976 (JA73), the District Court denied plaintiff's motion for a three-judge court, but in so doing expressed the view that with respect to DR 7-109C plaintiff was "in the classic declaratory judgment plaintiff's posture" (JA 85).

Plaintiff then moved for a summary declaratory judgment invalidating DR 7-109C; and the District Court, in a Memorandum and Order dated June 25, 1976 (JA148-156), granted plaintiff's motion although it declined to direct that judgment be entered. Thereafter, plaintiff moved for dismissal without prejudice of Counts One and Two of his Amended Complaint and for an order directing that final judgment be entered declaring DR 7-109C (and that Rule as incorporated in the Rules of the Appellate Divisions of the First and Second Departments) unconstitutional to the extent that it proscribes the payment of reasonable fees for the services of an expert witness if payment of the fees is contingent upon the outcome of the case. By Memorandum and Order dated August 10, 1976 (JA178-179), the Court granted this motion.

There has been no discovery in this litigation and the decision of the District Court was based exclusively on the affidavits of plaintiff and the pleadings.

**(2)**

Plaintiff's challenge to DR 7-109C is founded on the following allegations in his Amended Complaint. Plaintiff alleges that he is the attorney for ten plaintiffs ("Nabcor Plaintiffs") in an antitrust action in the Southern District of New York, *National Auto Brokers Corp.* v. *General Motors Corp.* (70 Civ. 5421), the "Nabcor Action" (JA 6). See published opinions in the Nabcor Action in 332 F.Supp. 280 (1971); 60 F.R.D. 476 (1973); and 376 F.Supp. 620 (1974).

In the Nabcor Action which is being tried before District Judge Griesa (see, *e.g.*, 176 N.Y.L.J. 91, p. 19, Nov. 10, 1976) Nabcor Plaintiffs seek damages which they allege were sustained by them as a result of conspiratorial activities by General Motors Corporation, General Motors Acceptance Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, First National City Bank and various other defendants, which drove Nabcor Plaintiffs out of business (JA6). Nabcor Plaintiffs seek in the aggregate $300,000,000 in damages after trebling (JA8).

Plaintiff further alleges that neither the National Auto Brokers Corporation ("Nabcor"), nor any of the other Nabcor Plaintiffs,* have the ability to pay the expenses of

* It is not clear from the record how many of the Nabcor Plaintiffs are corporations. However it appears from a reported decision in the Nabcor Action that at least three are corporations and one is a partnership. *National Auto Brokers Corp.* v. *General Motors Corp.*, 376 F.Supp. 620 (S.D.N.Y. 1974).

litigating the Nabcor Action and that this has resulted in a substantial reduction in plaintiff's and Nabcor Plaintiffs' ability to prosecute the action and to obtain a speedy and just resolution of the issues (JA12-13). Plaintiff further alleges that because of their poor financial condition the Nabcor Plaintiffs are unable to obtain adequate expert testimony in the fields of accounting, franchising, finance and economics unless the experts are paid on a contingent fee basis which DR 7-109C prevents (JA23). In his Amended Statement Pursuant to Rule 9(g) of the General Rules (JA144-148), plaintiff further claims that contingent fee arrangements by plaintiff and his clients with expert witnesses are possible. Plaintiff also claims to represent other antitrust plaintiffs (JA13).

## ARGUMENT

### I

### There is no case or controversy because plaintiff did not have an expert ready, willing and able to assist in the prosecution of the Nabcor Action on a contingent fee basis.

Plaintiff presented the court with a purely hypothetical set of facts. In his original Statement Pursuant to Local Rule 9(g) of the Eastern District of New York (JA93-96), plaintiff did not allege that he and the Nabcor Plaintiffs had an expert ready, willing and able to assist in the prosecution of the Nabcor Action for a contingent fee. In fact, it was evident that plaintiff had not even located an expert, and was merely speculating that "[s]ome arrangements by

.aintiff and his clients with expert witnesses to pay them reasonable fees on a contingent basis *are possible. . . .*" (JA95; emphasis added).

Without the existence of an expert ready to testify for a contingent fee the case was merely hypothetical because it was and is just as easy to speculate that plaintiff would not be able to obtain an expert ready, willing and able to testify on a contingent fee basis. Since plaintiff did not produce such an expert, this controvery was not real and substantial. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). As in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 (1947), "[n]o threat of interference . . . with rights of [plaintiff] appears beyond that implied by the existence of the law and the regulations". The District Court was, thus, without subject matter jurisdiction.

In his Amended Statement Pursuant to Rule 9(g) plaintiff unsuccessfully attempted to rectify this jurisdictional defect. In his Amended Statement he conceded that at the time of the hearing upon his motion, he was *still* "in substantial, present need of locating and retaining experts" (JA145). Although in his Supplemental Affidavit (JA 103), served on the day of the hearing on his motion for summary judgment, plaintiff did claim that an individual named Spector would testify on a contingent basis: it is apparent that no agreement had yet been reached with him because of Spector's desire to know more about the merits of the case and what the work entailed.

The District Court in its decision of June 25, 1976, avoided this issue by concluding that the "Rule, unless

ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to deny to the lawyer the opportunity to demonstrate the availability of such testimony and its specific place in particular cases'' (JA149-150). Of course, defendants take issue with this conclusion. DR 7-109C does not and did not prevent plaintiff from arranging with an expert to testify on a contingent fee basis *provided* DR 7-109C was declared unconstitutional. Since he failed to do so, there was no case or controversy.

## II

**DR 7-109C is a reasonable exercise of the broad power which States have over attorneys and the conduct of judicial proceedings.**

### (A) DR 7-109C is a reasonable Rule.

The basis of the constitutional challenge to DR 7-109C and the basis of the District Court's decision is that the Rule is irrational and operates to discriminate against those who cannot afford expert testimony and tends to deny to the less affluent access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious.

Disciplinary Rule 7-109C provides as follows:

> ''A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1. Expenses reasonably incurred by a witness in attending or testifying.

2. Reasonable compensation to a witness for his loss of time in attending or testifying.

3. A reasonable fee for the professional services of an expert witness."

The rationale for the proscription against payment of compensation to a witness contingent upon the outcome of the case is manifest. The State of New York, through its judiciary, has concluded that the presence of the contingency, in and of itself, tends to cause an expert witness to testify as to a particular state of facts or opinion more likely to enhance the chances for a favorable outcome of the litigation so that compensation will be forthcoming (whether a fixed amount or a percentage of the judgment). *Matter of Schapiro,* 144 App. Div. 1, 128 N.Y.S. 852 (1st Dept. 1911); *Matter of Imperatori,* 152 App. Div. 86 (1st Dept. 1912); *Laffin* v. *Billington,* 86 N.Y.Supp. 267 (App. Term, 1st Dept. 1904); see also *Wellington* v. *Kelly,* 84 N.Y. 543 (1881). See also the limited decision by a divided court in *Marine Midland Trust* v. *40 Wall Street Corp.,* 13 App. Div. 2d 118 (1st Dept. 1961), aff'd, 11 N.Y.2d 679 (1962), dealing with the approval of appraisers' fees in a court-administered derivative action and Burchill Act reorganization proceeding. Note that even in such a court-administered proceeding, Judge STEUER, in dissenting, wrote (p. 132):

> "The authorities collated are, in this State at least, unanimous in their condemnation of any practice which makes the compensation of a witness dependent on the outcome of the litigation."

He continued (p. 132):

> "The time of a professional witness can be bought; his opinion should not be vendable."

It is this tendency to false swearing which the Appellate Divisions of the Supreme Court of the State of New York, pursuant to their inherent power to control the conduct of judicial proceedings and pursuant to Section 90(2) of the Judiciary Law, have identified as an evil and have proscribed.

**(B) The District Court misconceived the basis for the Rule.**

In New York the Legislature has expressly provided that the judiciary has the power to regulate the conduct of attorneys. *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465 (1928, CARDOZO, Ch. J.); Judiciary Law §90(2). Section 90(2) of the Judiciary Law, in pertinent part, expressly provides that, "[t]he supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . . ." Pursuant to their power to regulate the conduct of attorneys, three of the four Appellate Divisions of the Supreme Court have adopted rules which define "professional misconduct" to be, among other things, conduct violative of any Disciplinary Rule of the Code of Professional Responsibility.*

Thus the precise mechanism for enforcing the proscription is the incorporation of DR 7-109C in the Rules of the Appellate Divisions for the First and Second Departments

* The Third Department rule simply states that a complaint for professional misconduct against a lawyer may be presented to the court by a party aggrieved or by a bar association. Section 800.28 of the Rules of the Appellate Division, 3rd Dep't.

(and the Fourth Department which is not a defendant here) such that any violation by an attorney of DR 7-109C will be deemed to be "professional misconduct" thus exposing that attorney to disciplinary measures. Moreover, the courts of the State of New York have refused to enforce the underlying contract between the expert seeking to be paid on a contingent basis and the client on the ground that the contract is against public policy. *Matter of Schapiro, supra.* The underlying contract is generally held to be against public policy. Restatement of the Law, Contracts, §552(2); 14 Williston, Contracts, §1716, p. 879 (3rd ed. 1972); and 6A Corbin, Contracts, §1430, p. 379.

Most if not all States have some form of prohibition against the participation of an attorney in paying contingent fees to expert witnesses. Generally the prohibition is contained in the Code of Professional Responsibility of the American Bar Association which is incorporated in the Rules governing the practice of law which courts or bar associations, by state statute, are authorized to promulgate; or it is found in the statutes themselves. In Nevada, for example, the Supreme Court is entrusted with the power to regulate the conduct of attorneys and by Rule 188 has expressly prohibited the payment of contingent fees to witnesses.

In concluding that DR 7-109C is irrational the District Court reasoned that the basis for the prohibition is the belief that *the ordinary expectation* is that experts generally will distort or misrepresent their opinions for a fee (JA154). The District Court deemed the Rule reasonable in prohibiting compensation to a witness "contingent upon the content of his testimony", but deemed it unreasonable

in so far as it forbade compensation "contingent upon the outcome of the case" (JA152).

The District Court's analysis misconceived the basis for the Rule. An expert, who will be paid in any event, is paid for his time and effort in examining facts and forming an opinion in his given area of expertise. If the opinion of the expert, after such an examination, is unfavorable to the party who engaged the expert, presumably that expert will not be called to testify. But *in any event,* the expert will be compensated for his time and labor; and thus there is no expectation that he will testify untruthfully because of the fee. However, an expert engaged on a contingent basis, no matter how reasonable that fee might be, is in a vastly different position because he will only be compensated if the outcome of the case is favorable. Thus *the ordinary expectation* is that there will be a tendency to falsify his testimony in order to favorably affect the outcome of the case. This expectation is not irrational.

It is certainly reasonable for the Courts of this State to conclude that the existence of the contingency in itself tends to cause false testimony and they are well within their power in establishing a prohibition against it. The District Judge merely substituted his judgment as to reasonableness for the judgments of numerous appellate State Court judges. We submit that he reached into an ivory tower in assuming that he could draw a line between contingencies dependent on "content" and those dependent on "outcome".

The District Judge disregarded the fact, recognized even earlier in New York, that as long ago as 1914, the

vice of making a contingent fee to a witness dependent upon the outcome of a case was recognized in a disciplinary proceeding in Montana. *In re O'Keefe*, 49 Mont. 369, 142 P. 638 (1914), contains this wise analysis by Judge Sanner (142 P., at p. 641):

> "The letters in question were not merely a promise to pay, but they made the payment contingent upon the successful outcome of the case. The fact that no legal liability was created by them, though they were drafted so as to deceive the Nakladahls into the belief that a valid promise had been made, does not meet the case. The material question is what effect such promises are calculated to produce upon a witness or upon his testimony, and it cannot be gainsaid that this effect is not in the direction of plain, unvarnished truth. In such matters the exigencies of any given cause must yield to the larger demands of public good, and we decline to hold that it is proper in this state for an attorney to buy testimony, whether true or false."

**(C) States have a compelling interest in regulating the conduct of attorneys that practice before them and are free to regulate the procedure of their courts.**

It is beyond dispute that the States have a compelling interest in regulating the conduct of professionals who practice within their borders. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809, 825 n.10 (1975); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-13 (1935). In *Goldfarb*, the Supreme Court, while declaring a minimum fee schedule for lawyers violative of Section 1 of the Sherman Act, 15 U.S.C. §1, never-

theless acknowledged the great interest which States have in regulating professional activity:

> "We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S., at 792 (emphasis added).

It is clear from *Goldfarb,* moreover, that States have an even greater interest in regulating the conduct of attorneys. In his majority opinion Mr. Chief Justice BURGER observed that "[t]he interest of the States in regulating lawyers is *especially great* since lawyers are essential to the primary governmental function of administering justice; and have historically been 'officers of the court.'" *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S., at 792 (emphasis added).

Historically, courts have had supervisory powers over the conduct of attorneys, *Lathrop* v. *Donohue,* 367 U.S. 820 (1961); *Theard* v. *United States,* 354 U.S. 278 (1957); *Powell* v. *Alabama,* 287 U.S. 45 (1932); *Ex Parte Secombe,* 19 Howard 9 (1856); *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.,* 345 F.Supp. 93 (S.D.N.Y. 1972); *Rubin* v. *Katz,* 347 F.Supp. 322 (E.D. Pa. 1972). "[I]t may be said that the power of a court to enforce the Code [of Professional Responsibility] is founded on its supervisory power over members of the bar." *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc., supra,* 345 F. Supp. at 95 n.1 (WEINFELD, J.).

At issue here is not merely the power to regulate the conduct of attorneys, but also the power of a State through its judiciary to regulate the procedures which govern the conduct of judicial proceedings.

The rule at issue here was promulgated in order to insure that judicial proceedings in the State of New York were free of false testimony which might be forthcoming if expert witnesses were paid on a contingent fee basis. Since expert testimony is particularly susceptible to abuse because by its very nature it concerns areas of knowledge with which the ordinary juror and the court are unfamiliar, and since the jury and the court generally rely on this testimony, it is incumbent upon the State to insure that the fee paid to an expert does not cause him to testify falsely. DR 7-109C is a regulatory measure intended to accomplish this purpose.

Moreover, contrary to the assumption underlying the District Court's assertion concerning the effectiveness of the Rule, DR 7-109C is not intended to root out all untruthful testimony. The Rule is directed at a particular problem, namely testimony by experts with a contingent interest in the outcome of the case. To be sure, the area of expert testimony is not free from difficulties. But appellants respectfully contend that allowing experts to testify on a contingent basis may only exacerbate whatever problems that may exist.

It is well established that a State is free to regulate the procedure of its courts, including its rules of evidence, "in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so

rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); *Burgett* v. *Texas,* 389 U.S. 109, 113-14 (1967). See *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Bute* v. *Illinois,* 333 U.S. 640 (1948); *Brown* v. *Mississippi,* 297 U.S. 278 (1936); *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.,* 284 U.S. 151 (1931); *Dohaney* v. *Rogers,* 281 U.S. 362 (1930); *Frank* v. *Mangum,* 237 U.S. 309 (1915); *Twining* v. *New Jersey,* 211 U.S. 78 (1908); *Rogers* v. *Peck,* 199 U.S. 425 (1905); *Maxwell* v. *Dow,* 176 U.S. 581 (1900); *Hurtado* v. *California,* 110 U.S. 516 (1884).

It is also established that "[a State's] procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser . . ." *Snyder* v. *Massachusetts, supra,* 291 U.S., at 105.

**(D) The determination that DR 7-109C is irrational and denies equal access to the courts is without legal or factual support. New York has not promulgated a rule which prevents access to the courts.**

**(1)**

Despite the broad power which States have to regulate attorneys and the procedures within their courts, the District Court nevertheless concluded that the prohibition against the payment of contingent fees to experts was irrational and constituted a denial of equal access to the courts. In so ruling the court apparently found that the case was governed by *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) and that *United States* v. *Kras,* 409 U.S. 434 (1973) was inapplicable. Of course, these were cases in which *State-imposed fees* prevented *access to the courts.*

*Boddie* was an action brought on behalf of all those female welfare recipients who resided in Connecticut and desired divorces to declare invalid Connecticut statutes as applied to them which required payment of court fees and costs for service of process as a condition precedent to obtaining a divorce. The United States Supreme Court declared the fees unconstitutional as applied to the indigent plaintiffs on the ground that they violated due process, but expressed the following caveat (401 U.S., at pp. 382-383):

> "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. *We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.* The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (Emphasis added).

Thus *Boddie* carefully circumscribed its requirement of access to the courts to situations involving a state-preempted right to dissolve marriage, where resort to the courts was the exclusive means of asserting that right,

where the poverty of plaintiffs was conceded and there was involved a fundamental interest, marriage.

The extent to which *Boddie* is a limited holding is fully evident from *United States* v. *Kras, supra* (1973), which the District Court summarily dismissed. *Kras* was a suit brought by an indigent challenging the constitutionality of certain *government-imposed fees,* fixed by the bankruptcy laws upon filing of a petition in bankruptcy, payment of which was a condition precedent to a voluntary discharge in bankruptcy. Citing *Boddie,* plaintiff Kras claimed that he was unable to pay these fees and thus was not able to obtain a discharge in bankruptcy with the consequence that his Fifth Amendment right to access to the bankruptcy court was abridged. The Supreme Court distinguished *Boddie,* however, holding that Kras' interest in eliminating his debt burden did not rise to the same constitutional level as the dissolution of a marriage and that alternatives were available to him other than the courts. To this same effect, see *Ortwein* v. *Schwab,* 410 U.S. 656 (1973), where Oregon's $25 appellate court filing fee was determined to be neither violative of the Due Process or Equal Protection Clauses. *Cf. Lindsey* v. *Normet,* 405 U.S. 56 (1972), where the Supreme Court upheld Oregon's judicial procedure for eviction of tenants, after nonpayment of rent, against challenges under the Equal Protection and Due Process Clauses, but struck down the double-bond prerequisite for appeal as violative of the Equal Protection Clause. *See generally, The Supreme Court, 1972 Term,* 87 Harv. L. Rev. 55, 57-67 (1973).

A comparison of *Boddie* and *Kras* leads inexorably to the conclusion that the instant case falls squarely within

*Kras* (if, indeed, it is an "access" case), and that *Boddie* is inapposite. However, before comparing the cases in detail, we note again that, unlike both *Boddie* and *Kras*, this case does not involve government-imposed fees as a condition of access to the courts. Nor does it involve an indigent. The record is devoid of any facts establishing that any of the individual Nabcor Plaintiffs are impoverished. There is no claim, for example, that they are on welfare. To the contrary, the record shows that certain of the Nabcor Plaintiffs are employed, presumably as businessmen, and that they are too busy working to testify as experts on their own behalf (JA 102). Plaintiff's claim is merely that the Nabcor Plaintiffs are "unable"* to pay the fees for expert testimony, and not that they are indigents. And unlike *Boddie* and *Kras*, even this claimed inability is not *conceded*.

Moreover, unlike *Boddie* and *Kras*, the Nabcor Plaintiffs are, and were at the time that this action was brought, actually in court actively litigating the Nabcor Action and, eventually, a favorable judgment may be obtained without expert testimony or the case may be settled.

---

* Due to the summary nature of the proceedings below, defendants, despite their contention that discovery should be had, were denied the opportunity to ascertain the financial status of the individual Nabcor Plaintiffs (plaintiff's affidavits do not detail this information). Although defendants have no reason to doubt the good faith of plaintiff in asserting that the Nabcor Plaintiffs were "unable" to pay fees for expert testimony, nevertheless, with adequate discovery, defendants might well have been able to show that the Nabcor Plaintiffs in fact had the means to provide expert testimony. "Unable" at best is a conclusory word. In addition, apparently more than one of the Nabcor Plaintiffs are corporations and certainly the financial inability of a corporation does not allow it to avail itself of a legal contention premised on the denial of equal access to the courts because of poverty.

Since the Nabcor Plaintiffs are beyond the threshold of the Court, this is not really an "access" case. In both *Boddie* and *Kras* the fees actually prevented the individuals from commencing the action. This case is more akin to ones involving the constitutionality of procedural rules, such as liberal rules for discovery, which have the incidental effect of placing an economic burden on litigants.

*Boddie* is distinguishable from the instant case in a number of additional respects. First, and perhaps foremost, it dealt with the marriage relationship which "involves interests of basic importance in our society". 401 U.S., at 376. Here no such basic right is involved. Plaintiff and his clients are merely seeking damages to their businesses for alleged antitrust violations. As stated in *Kras*, "bankruptcy legislation is in the area of economics and social welfare .... There is no constitutional right to obtain a discharge of one's debts in bankruptcy". 409 U.S., at 446. Surely antitrust legislation is in the area of economic and social welfare, and there is no constitutional right to pursue antitrust claims. "Government's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement and dissolution of marriage." 409 U.S., at 445-46.

In *Boddie*, moreover, the Court emphasized the fact that the State had monopolized the means for legally dissolving marriage and absolutely no alternative existed to affect dissolution. The *Kras* Court, however, reasoned (409 U.S., at 445) that alternatives existed because private arrangements were theoretically available to *Kras* to solve his economic problems. Of course just such a possibility exists

here, contrary to the conclusion of the District Court, "[h]owever unrealistic the remedy may be . . .", *e.g.*, a contractual settlement or arrangement with the defendants in the Nabcor Action. Moreover, the Nabcor Plaintiffs are suing in a *federal* forum and pursuing a *federally-created* right, so there is obviously *no State monopolization of the means of asserting the right*. *Ross* v. *Moffitt*, 417 U.S. 600 (1974). It is also noteworthy that DR 7-109C does not involve a fee imposed by the State. The Rule does not prevent the Nabcor Plaintiffs from obtaining an expert willing to testify for little or no compensation.

**(2)**

Since it is unclear from the memorandum decision of the District Court whether its determination was founded upon the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, appellants will address arguments that could be raised under both.

**(3)**

*Boddie*, according to the majority opinion, was a due process case. Since, as discussed above, resort to the courts in the instant case is not the exclusive avenue for redress, the due process decisions cited in *Boddie* have little bearing on the issue *sub judice*. Moreover, it is obvious that the Nabcor Plaintiffs have had an opportunity to be heard and are still being heard; thus a fundamental requisite of due process has been satisfied. It is also apparent, as discussed earlier, that DR 7-109C is not an arbitrary prohibition.

Even if this were to be deemed a case involving access to the courts, the District Court should have heeded the

more pertinent ruling in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). That case involved a constitutional challenge to a State statute that required security for the reasonable expenses and attorneys' fees which a corporation may incur or for which it may become liable in any stockholder derivative action in which the plaintiff's interest as a shareholder is less than 5% of the value of all outstanding shares and has a market value of less than $50,000. Plaintiff argued (337 U.S., at 552) that the security requirement violated due process because it "foreclose[d] resort by most stockholders to the only available judicial remedy for the protection of their rights". The Supreme Court was unpersuaded by this argument. It stated (p. 552):

> "A state may set the terms on which it will permit litigations in its courts. . . . Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom, and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

**(4)**

The essence of the plaintiff's Equal Protection argument is that DR 7-109C establishes an irrational classification based on wealth: those able to pay expert witnesses reasonable fees do not need to resort to contingent fee arrangements, while those unable to pay these fees are denied the opportunity to have expert testimony and thus are denied equal protection of the laws.

Wealth discrimination, however, is not a suspect classification such that strict judicial scrutiny is required. In

*San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 29 (1973), the Supreme Court expressly stated that "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny".

Since there is no fundamental right to litigate antitrust actions, the instant case involves solely wealth discrimination. Thus, strict judicial scrutiny is not required.

Moreover, "[d]ifferences in ease of access to the courts have not been held to implicate such fundamental rights that the state must show a 'compelling state interest' to support any differentiation". *Manes* v. *Goldin,* 400 F. Supp. 23, 29 (E.D.N.Y. 1975), *aff'd* 423 U.S. 1068 (1976) (upholding the constitutionality of New York State statutes raising court filing fees and charges in New York City).

It follows that the standard to be applied in this case, and the standard presumably applied by the District Court, is that of rationality. That standard is set out in *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" (Emphasis added).

The justification for the prohibition against the payment of contingent fees to an expert witness is to protect the judicial system from false swearing. It is certainly reasonable for the State to conclude that the existence of the contingency is sufficient in itself to cause falsification of testimony. Surely DR 7-109C is a rational measure to prevent this evil. Certainly it does not advance plaintiff's position to argue that false swearing by some experts still exists. "The [Supreme] Court more than once has said that state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time." *Schilb* v. *Kuebel,* 404 U.S. 357, 364 (1971).

## III

**The District Court clearly abused its discretion in determining the constitutionality of DR 7-109C in a summary manner.**

DR 7-109C is entitled to a presumption of constitutionality, *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969), but the District Court made no such presumption. In fact, although during the hearing on plaintiff's motion for a declaratory judgment the Court indicated that it wanted more Brandeis-type of background material because the case had many sociological overtones, the Court nevertheless summarily concluded that the rule was irrational because, *inter alia,* the "purpose of the prohibition, to remove an incentive to untruthful testimony is not likely to be achieved by the Rule and, to the extent achieved, would be gained at too great a loss in fundamental fairness" (JA154). This conclusion was made in the absence of any support in the record and without affording defendants an opportunity to present evidence which could lead to a contrary conclusion. The record consists of

merely the conclusory statements of plaintiff in his affidavits which the defendants requested the opportunity to test by way of discovery. No testimony was taken and no studies or charts were submitted.

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion exercised in the public interest." *Eccles* v. *Peoples Bank of Lakewood Village,* 333 U.S. 426, 431 (1948). The United States Supreme Court has shown a marked reluctance to use the declaratory judgment device to resolve important issues of public law. Wright, Law of Federal Courts, §100, p. 449; *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75 (1947); *Eccles* v. *Peoples Bank of Lakewood Village, supra; Golden* v. *Zwickler,* 394 U.S. 103 (1969). In *Eccles,* the Supreme Court stated (333 U.S., at p. 431):

> "It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative."

*Eccles* stressed that summary relief based solely on affidavits, on matters of general public interest was too treacherous to be trusted. The Court stated (p. 434):

> "[The Bank's] claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment."

The Rule at issue here is one of long standing and is presumed to be constitutional absent clear evidence that it discriminates irrationally. "The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years." *Life & Casualty Ins. Co.* v. *McCray*, 291 U.S. 566, 572 (1934); *Kelley* v. *Johnson*, 425 U.S. 238 (1976).

Clear evidence of irrational discrimination does not appear in plaintiff's affidavits.

The record is also barren of any evidence to support the conclusion that DR 7-109C in fact is a barrier to entry to the courts for the poor. In fact Mr. Person, during the entire course of the consideration of the matter of the constitutionality of DR 7-109C, was actively engaged in discovery in the Nabcor Action and the case is presently being tried (176 N.Y.L.J., No. 91, p. 19, Nov. 10, 1976). DR 7-109C is no more a barrier to entry than are the costs of the discovery of which he also complains.

The remedy of a declaratory judgment, moreover, was particularly inappropriate here because the judgment does not prevent, nor does it purport to prevent, the courts of the State of New York or other District Courts from continuing to hold void the underlying contract for a contingent fee.

In essence, in declaring DR 7-109C unconstitutional, the Court may have engaged in a futile act. Plaintiff never requested that the Court declare any underlying agreement to be valid, and the Nabcor Plaintiffs themselves were not before the Court requesting such relief.

The judgment of the District Court was also not limited to a determination that DR 7-109C was unconstitutional

only as applied to indigent plaintiffs. The judgment as it now stands would allow a wealthy plaintiff to pay an expert witness on a contingent fee basis, so it is clear that the District Court went well beyond what was necessary to provide adequate relief.

## Conclusion

It is respectfully urged that the basis for DR 7-109C is rational and that the prohibition is a proper exercise of state power. It is not unreasonable for the State of New York to conclude that the existence of the contingency, in and of itself (regardless of whether the contingent fee may be reasonable), tends to cause false testimony and should be prohibited.

**The judgment of the District Court should be reversed.**

Dated: New York, New York
November 17, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Defendants-Appellants*
Two World Trade Center
New York, New York 10047
(212) 488-3446

SAMUEL A. HIRSHOWITZ
*First Assistant Attorney General*

DANIEL M. COHEN
*Assistant Attorney General*
*Of Counsel*

Service of 3 copies of the
within Brief is hereby
admitted this 17th day of
November 19 76.
Signed CARL E PERSON by 4 Jours 4th Pm

Attorney for Plaintiff-Appellee, Pro Se

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5643)